

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

ORIGINAL

77-1208

To be argued by
BARRY A. BOHRER

BP/s

United States Court of Appeals
FOR THE SECOND CIRCUIT

DOCKET No. 77-1208

UNITED STATES OF AMERICA,

Appellee,

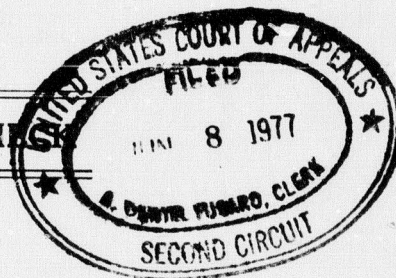
against

SANDY CHECK,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE APPELLANT SANDY CHECK



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA, :

Appellee, :

Docket No. 77-1208

-against- :

SANDY CHECK, :

Defendant-Appellant. :

-----x

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF APPELLANT

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

Sandy Check appeals from a judgment of conviction entered on March 18, 1977, in the United States District Court for the Southern District of New York (Hon. Constance Baker Motley), on an indictment (S76 Cr. 1089) charging him, along with Philip Marasco, with two counts of distribution and possession with intent to distribute heroin, and with

conspiracy to commit the substantive offenses. Check was found guilty, after a jury trial, on all counts.* On March 18, 1977, Check was sentenced to a term of one year's imprisonment on each of the three counts, to run concurrently. In addition, the Court imposed a three-year term of special parole to commence upon the termination of the period of incarceration.

Statement of the Case

The Government's evidence was given primarily by Stephen Spinelli, a Detective in the New York City Police Department assigned to the undercover unit of the Organized Crime Control Bureau.

Detective Spinelli testified that, in August, 1974, he was engaged in an investigation of Sandy Check, a New York City Police officer allegedly involved in the sale and transportation of narcotics. In the course of that investigation, Spinelli was introduced to one William Joseph Cali, a confidential informant, by Richard Nalley, a Special Agent of the Federal

*The Court dismissed the substantive counts against Morasco at the end of the case. Morasco was found guilty on the remaining conspiracy count. He has not appealed.

Bureau of Investigation. (Tr. 64)*

On August 8, 1974, Detective Spinelli, using the name Daniel Gennaro, met Cali in Dave's Restaurant, located on the corner of Canal Street and Broadway in Manhattan, for the purpose of meeting with Check to discuss the purchase of one ounce of cocaine (62). Subsequently, Check arrived and motioned through a window for Cali, an acquaintance of his, to come outside (67). Cali went outside and engaged Check in conversation. Upon his return to the restaurant, Cali apparently** told Spinelli that Check wanted Spinelli to "front" a sum of money for the purchase of narcotics; that Check had left the "taste" of cocaine which Spinelli was supposed to receive at his house; that Check wanted Spinelli to pay three hundred dollars supposedly owed to him by Cali from a previous narcotics deal (69).

Cali then left the restaurant again to converse with Check and returned to (apparently) tell Spinelli that

* References to the trial transcript shall hereinafter be designated by the page number appearing within parentheses.

** Cali did not testify. The Government, over objection, presented the substance of his conversations with Check through the testimony of Spinelli who was not present at any of these conversations.

Check was concerned about "rats" and being "busted by the man" (69). Cali continued this conversational shuttle between Check and Spinelli, and upon his return from the third discussion with Check apparently told Spinelli that Check had represented the cocaine to be seventy percent pure and that the cocaine was supposed to come from a captain of detectives. In addition, Cali apparently reiterated Check's insistence upon the "front" money -- \$1200 for the ounce of cocaine -- and the \$400 which Cali supposedly owed to him (71). Spinelli stated that he didn't care about the purity of the cocaine nor its source. He maintained that he would not "front" money to Check nor pay Cali's debt (72).

Spinelli and Cali then relocated to a nearby bar where Cali apparently informed Spinelli that Check was going to make arrangements to get the ounce of cocaine; Cali was to call Check to confirm the transaction (77). Cali called Check later that afternoon and apparently reported to Spinelli that Check had problems with his supplier. Arrangements were made for Cali to meet Check the following day with Spinelli waiting a few blocks away with the money in hand.

The following day, August 9, 1974, Spinelli accompanied Cali to the lower East Side where they saw

Check with another male whom Cali apparently identified as "Duky," Check' "runner" (93). Cali approached Check and "Duky" while Spinelli proceeded to a coffee shop to await Cali's return. Cali apparently told Spinelli that they were to meet Check at Little Peter's Bar on East 5th Street and Second Avenue. The informant and the agent went to the bar. Soon thereafter, Check appeared at the window and motioned to Cali to meet him outside. After a short conversation with Check outside the bar, Cali returned and apparently told Spinelli that Check was not offering an ounce of heroin at a price of \$2200, or one-half ounce for \$1100 (105). Spinelli, miffed at the change in plans, declined the offer. Cali returned to speak to Check and then apparently reported to Spinelli that the heroin was of high quality and that a "taste" was available for fifty dollars. Spinelli again instructed Cali to relay his disinclination (107).

Eventually, Spinelli changed his mind and decided to purchase a "taste" of heroin for fifty dollars. Cali once again engaged Check in conversation, while Spinelli observed from afar. Finally, Check gestured to Spinelli to join him and Cali who were seated on the steps of a building on East

5th Street; Cali introduced the two to each other (126). Spinelli testified that Check told him of problems in meeting his "connection" and that he had attempted to obtain the taste of heroin (128). After discussing the quality of his prospective purchase, Spinelli gave Check fifty dollars for the heroin (130). Check then told Cali that Cali would receive a phone call that evening from "Duky." In response to Spinelli's inquiries regarding Duky's trustworthiness, Check stated that Duky was his "runner." (132). Spinelli did not receive the taste of heroin that night (93). It was not until three nights later, April 12, 1974, that he received the heroin. The sample was delivered by Cali in the Burger Brew restaurant on Second Avenue and 52nd Street (95).

The following evening Spinelli met Check at Little Peter's where they discussed the purchase of one-half ounce of heroin. Check stated that Cali owed him \$300 from a previous narcotics transaction. Spinelli gave Check \$1200 for the half-ounce and \$150 as a partial satisfaction of Cali's obligation (101). Check counted the money, informed Spinelli that he would have to wait a short time and left the bar. Approximately forty minutes later, Check returned and instructed Cali to go outside and get the package from Duky (103). Spinelli shook hands with Check and met Cali on the street corner where he and Cali entered a taxi. Once inside, Cali handed Spinelli

an envelope which contained approximately one-half ounce of heroin (107).

Spinelli did not see Check again until the early morning hours of August 22, 1974, when the two met in the ROK Bar on Second Avenue and Fourth Street (118). They discussed the possibility of a one-eighth kilogram heroin transaction, which Check agreed to for a price of \$5600 (123). Check told Spinelli that he would call him, using a fictitious name and complex code in order to relay information regarding the status of the transaction (121). Spinelli heard nothing further from Check (144).

The next time Spinelli saw Check was nearly two years later, on August 5, 1976. Spinelli was wearing an electronic recording device; the conversation which he initiated with Check was recorded.* The conversation is marked by Spinelli carrying the bulk of the conversation with Check making mostly monosyllabic responses to Spinelli's inquiries regarding narcotics. Check was subsequently arrested on December 1, 1976, over two years after the transactions alleged in the indictment (542).

* The full transcript of the conversation is set forth in the Appendix at .

At trial, the Government introduced tape recordings of two other conversations. One was a recording of a phone call made by Cali to Check on October 21, 1975.* The conversation, encompassing seven pages of transcript, is marked by Cali doing most of the talking with Check again uttering monosyllabic responses. The most incriminating remark that the Government could glean from Check's conversation was the following:

Cali: ...Listen, Sandy if it's possible
you think we could do anything?

Check: No.

Cali: No more?

Check: No more.

The other conversation, recorded two days later, on October 23, 1975, involved Cali (who was equipped with a Kel transmitter) and co-defendant Marasco.* The two discussed narcotics, but without reaching any agreement or understanding with respect to trafficking. Cali made propositions to which

* The full transcript of the conversation is set forth in the Appendix.

Marasco did not respond. In fact, Cali represented that Check had liked the proposal which he had offered; this representation was untrue (357).

The Government also introduced into evidence the testimony of Marasco before a federal grand jury on October 5, 1976 (532-541). At approximately 10 A.M. on October 5, 1976, Marasco was served with a subpoena by agents of the Federal Bureau of Investigation (449). Marasco was told that his testimony was needed against a corrupt police officer that was molesting little girls (381). Two police officers then offered to drive Marasco to the United States Court House in a police vehicle. Marasco accepted the offer and was subsequently taken to the United States Attorney's Office (438). There, he was asked to cooperate with the Government in the investigation of the Check case in return for complete immunity from prosecution (395). Marasco remained in the United States Attorneys Office for approximately five and one-half hours; he refused the offers of immunity. He was then escorted before the Grand Jury where he gave the testimony which the Government introduced at trial on the theory that Marasco made falso exculpatory statements or, in the alternative, admissions.

In the Grand Jury testimony, Marasco stated that he is sometimes known by the name "Butch" and "Duke" (533); that he knew Sandy Check for approximately fifteen years; that narcotics were the subject of conversations he had with Check (535);* that he knew of a bar named Little Peter's (535); that he had been in this bar with Check in the past, that he never had any discussion with Check regarding the purchase, sale or negotiations of narcotics (537); that he knew an individual by the name of William Joseph Cali (537); that he never had discussions with Cali regarding narcotics (538); that he never delivered a package to Cali that contained narcotics (538); that he had no knowledge whatsoever of any transactions in narcotics involving Cali and Check.

The Government's final piece of evidence was a slip of paper seized from Marasco as a result of a search pursuant to his arrest on November 30, 1976 (543). Written on that slip of paper was the following: "28-20 Ocean Parkway, 372-1432" (543). Special Agent Purser of the Federal Bureau

* He later testified that he never talked about narcotics.

of Investigation testified that as a result of his investigation, he determined that the address and phone number on the slip of paper were those of Sandy Check (544). Check admitted as much during his testimony at trial.

Check took the witness stand to testify in his own behalf. Check testified that he knew the co-defendant Marasco for some fifteen years and that he called Marasco by his nickname, "Butch" (634). He testified that he also knew Cali who had once proposed to help Check by arranging for a good drug arrest (637). It was with this thought in mind, Check testified, that he agreed to meet with Cali at Dave's Luncheonette on August 8, 1974 (638). Check denied selling drugs or meeting Spinelli on August 9, 1974, and denied receiving fifty dollars from him (640). Check likewise denied receiving \$1350 from Spinelli on August 13, 1974 (642). He stated that he did have a conversation with Spinelli in the ROK Bar on August 21, 1974; he dismissed Spinelli, who was discussing narcotics in an uninhibited manner, as a "crackpot" (645).

Check testified that he had, on occasion, lent small sums of money to Cali, but that he had never asked to be repaid (647). He characterized Cali as a narcotics addict whose motives for involving Check with Spinelli were

obtaining drugs and money (646). Check further testified that, while he and Marasco alluded to their changing neighborhood and the effects of narcotics in various conversations, the two never discussed the sale or distribution of drugs (646).

At the close of the Government's case, both defendant's moved for judgments of acquittal pursuant to Rule 29 of the Federal Rules of Criminal Procedure. The Government consented to the dismissal of the two substantive counts of the indictment with respect to Morasco (549). The trial judge then granted Marasco's motion for a judgment of acquittal as to those two counts (549). The trial judge denied Check's Rule 29 motion as to all counts in the indictment and Morasco's motion with respect to the conspiracy count (565-6; 576-7).

The District Judge's Charge to the Jury

In a rather unusual procedure, the District Judge submitted the case to the jury by way of a bifurcated charge. Initially, the District Judge charged the jury with respect to Counts Two and Three of the Indictment, the substantive

counts, which related solely to defendant Check. The Court instructed the jury that after they had deliberated on the substantive counts, the Court would then charge the jury with respect to the conspiracy count (924). The jury retired to commence their deliberations at 5:55 p.m. and returned with a verdict at 9:40 p.m. The District Court then proceeded to give a rather complex conspiracy charge; the jury retired to deliberate again at approximately 10:20 p.m. (963).

Counsel took general exceptions to the jury charge as a whole in addition to specific exceptions with regard to the District Court's bifurcated submission of the case to the jury. Counsel contended that the procedure followed by the Court was tantamount to asking the jury for special findings and a special verdict, something not permissible -- as a general rule -- in criminal cases. In addition, counsel argued that this procedure allowed the jury to consider and apply hearsay declarations to their determination of the substantive counts without any guidance or limiting instructions from the District Court. With respect to the latter conspiracy charge, it was argued that the lateness of the hour -- 10:20 p.m., some 12 hours after the jury had arrived in the courtroom -- cast a coercive air over their deliberations. The District Court sent the jury home for the night. The following day the jury found both defendants guilty on the conspiracy count.

POINT I

THE ADMISSION OF PREJUDICIAL HEARSAY CONSTITUTED
REVERSIBLE ERROR.

At trial the Government presented the bulk of its evidence through the testimony of Stephen Spinelli, a Detective in the New York City Police Department. It soon became apparent, however, that what the Government was eliciting from Spinelli were the statements, perceptions, and observations of William Joseph Cali, the Government informant. The Trial Judge admitted these glaring, albeit implicit, hearsay utterances of Cali over the vigorous and continued objections of defense counsel (E.g., 79, 82, 92, 93). On this appeal, Check contends that the "back door" admission of this hearsay so contaminated the evidence as to constitute reversible error.

Cali's role in the events which provided the basis for the trial of this case placed him at center stage for the duration of the conspiracy encompassing the August transactions. It was Cali who called Check to arrange for a meeting at Dave's Luncheonette. It was Cali who acted as a "go-between" at the initial negotiations involving Spinelli and Check. It was Cali who received the "taste" of the heroin and later the one-half ounce of heroin. Thus Cali was the crucial hub around which the introductions, arrangements, negotiations, and transactions

revolved. Yet, as the Government began to unravel its case before the jury, it kept Cali behind the curtain.

In spite of this, however, the Government was not without Cali's observations, representations, or conclusions at trial. It managed to introduce this obvious hearsay by a method that was disingenuous in the extreme. In an exercise of evidentiary slight of hand, the Government elicited statements obviously attributable to Cali by asking its witness, Spinelli, to state what he told Cali without stating what Cali told him. This "back-door" method of introducing evidence indirectly which could not be admitted directly was as prejudicial to Check as it was transparent. The results of this method of examination brought the prejudice into sharp relief. Thus after having testified that Cali had returned after conversing with Check on the street outside of Dave's Luncheonette, Spinelli testified:

I--after we had the conversation, I instructed William Cali that by no means did I intend to front any sum of money to Sandy Check, I didn't particularly care for the fact that--initially he was supposed to come with an ounce of cocaine, and the taste which he had, which I was supposed to get prior to making the ounce buy of cocaine, was at his house, and due to the fact that it wasn't of good quality, I wasn't particularly concerned, as good faith wasn't being shown to me, especially for the fact I also told William Cali I had no intentions of giving Sandy Check \$300 which William Cali owed to him from a previous narcotics deal (68-9)

And then:

At that time I told William Cali I didn't particularly care whether or not Check was concerned about rats and

not wanting to meet anyone new or about being busted by the man, and I still had no intention of fronting any money or the \$300 which Cali owed him (69).

And then:

He was conversing with Sandy Check, and following that he subsequently again entered the restaurant. I told William Cali at the time I didn't particularly care whether or not the cocaine which I was supposed to get was 70 percent pure, nor the fact that it was supposed to come from the captain of detectives; I had again still no intention of fronting any money to him, the \$1200 for the ounce of cocaine or the \$300 which William Cali owed to him.

And then:

I had a conversation with William Cali and at the time I informed him that I was glad to find out that Check, after seeing me in the street, had felt somewhat more comfortable now, that he was going to make arrangements now to get the ounce of cocaine that I wanted, and I was willing to wait with him to call Check at a quarter after 1:00, and then subsequently proceeded to pick up that ounce of cocaine (77).

After having testified that he overheard Cali's portion of a subsequent phone call to Check, Spinelli testified:

I, at that time with William Cali, I told William Cali that I was willing to wait until the following day to get the ounce of cocaine, that I could understand that there was problems with Sandy Check's supplier, and that I would definitely have the money with me, and as arrangements, I would drop Cali off to meet Sandy Check and wait for him a few blocks away from the location (81).

And then:

While en route to that location, I observed Sandy Check on the street with one other individual, at

the time an unknown male to me, and after a conversation with William Cali I informed Cali I was glad to see that Sandy Check did in fact intend to trust me, and that there wouldn't be any problems, I would be able to confront him that day, being that he was with his runner, Dukey (86).

And again at the behest of the Government:

Q Without telling us what Mr. Cali said to you, what did you say to him during that conversation?

A I told William Cali at this time I had no intentions of purchasing an ounce of heroin, I didn't come there to purchase heroin, I came here to purchase an ounce of cocaine, and I wasn't going to pay \$2200 for an ounce of heroin when the original deal was set up for \$1200 for an ounce of cocaine (105).

And again:

I instructed Cali at that time, I didn't care about their problems, what they were having with their connections and their suppliers...

I told William Cali that I wasn't at all concerned with the problem that Sandy Check was having with his connection, and that because of his connection wasn't being supplied he couldn't get the heroin, there was a problem with the heroin, and now I wasn't going to be able even supposedly to get that (118-19).

Thus, before Spinelli had testified that he met Check for the first time, the jury had learned chapter and verse about the proposed transaction through nothing more than neatly disguised rank hearsay. Without hearing from the obvious source

of all the particulars regarding the deal- Cali - the jury was told that Check wanted Spinelli to "front" a sum of money for the purchase of narcotics; that Check had left a "taste of cocaine at his house; that Check wanted Spinelli to pay three hundred dollars supposedly owed to him by Cali from a previous narcotics transaction; that Check was concerned about "rats" and being "busted by the man"; that the cocaine Spinelli was supposed to get was seventy percent pure; that the cocaine was supposed to come from the captain of detectives; that Check was having problems with his supplier; that Check had a "runner" named "Duky"; that Check wanted to sell heroin instead of cocaine, and that a "taste" of heroin was available for fifty dollars.

The admission of Spinelli's testimony as to declarations obviously made by Cali violated the central purpose of the hearsay rule, which is to give litigants an opportunity to cross-examine the persons on whom the fact finder is asked to rely. United States v. Pacelli, 491 F.2d 1108 (2d Cir. 1974). The factors upon which the credibility of testimony depends are the perception, memory, and narration of the witness. In order to expose inaccuracies which may be present with respect to any of the foregoing factors, our system has evolved three conditions under which witnesses ordinarily will be required to testify: oath, personal presence at trial, and cross-examination.

McCormick on Evidence (Cleary Ed. 1972), ¶245. Yet none of these conditions were complied with as to the source of these critical particulars implicating Check in the criminal venture.

Indeed, fully cognizant of the fact that Cali, the source of this information, was a potentially unbelievable witness subject to severe impeachment*, the Government sought to circumvent the hearsay rule by employing a more stable and credible witness to relay the information to the jury. Rather than hearing this evidence from an inherently unbelievable witness, himself enmeshed in criminality, the jury instead heard it from a Detective of the New York City Police Department.

It seems clear that this was the intention of the Government from the outset. At no point during the proceedings did the Government evince an interest in calling Cali as a witness. On the contrary, though well into the presentation of its case, the Government had "not determined whether or not" it would call Cali as a witness (103). Later on during the trial, long after the point at which the prejudicial impact of the admission of the hearsay could be mitigated, the Government stated: "It is obvious to the Court at this point that the Government at this point does not plan to call Cali as a witness."

* Cali was a narcotics user, perhaps an addict.

(266). It suggested, in turn, that defense counsel do so. However, it soon became apparent that this would not be possible, as Cali informed the Court that he would not testify under any circumstances, electing to invoke his privilege against self-incrimination and, if necessary, subjecting himself to a citation for contempt in the face of a grant of immunity (270).

The possibility that Cali would be available to testify, indeed the Court's belief that he would do so, constituted a basis for the Court's overruling the constant objection lodged by defense counsel. In addition, relying upon the Government's representation that Cali may be deemed a conspirator and the testimony admissible subject to later connection, the Court allowed the testimony on that provisional basis. There was absolutely no justification for this theory, however, and the Government was fully aware that there was none. At the time of the conversations in question, August, 1974, Cali could under no circumstances be regarded as a co-conspirator of Check's, for he was at that time an agent acting on behalf of the Government. The Government admitted as much. Thus, at the time it admitted the prejudicial hearsay, the District Court was lead to believe that Cali would be available to testify as a Government witness and that he could be deemed a co-conspirator whose statements would be admissible subject to later connection,

neither of which were the case.

In light of Cali's failure to testify at trial, the prejudice resulting from the admission into evidence of massive amounts of hearsay takes on constitutional dimensions. The Government's end-run with respect to this evidence deprived Check of his Sixth Amendment right to confront the witnesses against him. The Supreme Court had indicated that the considerations governing the hearsay rule also animate the principles of the right to confrontation. The Court has emphasized the importance of subjecting evidentiary statements to challenge by cross-examination of the declarant during at least some state in the judicial proceedings against a defendant. The function of the cross-examination requirement is to assure that "the trier of the fact has a satisfactory basis for elevating the truth of the prior statement" introduced at trial by hearsay testimony. California v. Green, 399 U.S. 149, 161 (1970).

In the present case, however, the trier of the fact had no such basis. To argue that the jury was not considering hearsay because Spinelli was testifying as to his statements to Cali borders on the preposterous. The content and the context of Spinelli's testimony shows clearly that it was no more than a vehicle for the introduction of Cali's statements. It is

obvious that the only foundation for Spinelli's responses was information supplied by Cali on the basis of his conversations with Check. Had this method of circumventing the hearsay rule and Check's right to confrontation occurred sporadically throughout the trial it would, perhaps, be more readily justifiable. Here, however, where the Government employed the method continually and as a matter of trial strategy, it cannot be countenanced. To do so would allow the Government, in similar cases, to camouflage the hearsay of a possibly incredible informant-witness by presenting it through an agent incorporating the hearsay in his "response" to the declarant. The danger is clear and its presence here cannot be ignored.

The admission of this welter of prejudicial hearsay, involving matters directly related to Check's involvement in narcotics and the specific transactions alleged, so contaminated the proceedings below as to deny Check a fair trial. Before the jury had heard direct, competent evidence of Check's culpability vel non, they were informed that he wanted advance payment for narcotics; that he had narcotics stashed at his house; that he had apparently dealt in narcotics in the past; that he was having problems with his supplier; and that he employed a "runner." Yet kept from the jury was the source of this information, an inherently unreliable source who would have been subject to

severe impeachment. As a result, Check was denied the opportunity to confront a crucial witness against him, a witness who was responsible for the jury hearing this devastating evidence. Accordingly, the admission of this hearsay was clear error warranting reversal of Check's convictions.

POINT II

THE TRIAL JUDGE ERRED IN SUBMITTING THE CONSPIRACY COUNT TO THE JURY.

At the close of the Government's case and again after all parties had rested, both Check and the co-defendant, Marasco, moved for judgments of acquittal pursuant to Rule 29(a) of the Federal Rules of Criminal Procedure. The Government consented to Marasco's motion with respect to the two substantive counts and the Trial Judge granted the motion. In addition, the Trial Judge rejected the argument that there was insufficient non-hearsay evidence to permit the admission against Marasco of certain hearsay statements made by his alleged co-conspirator Check.

On this appeal, Check argues that the non-hearsay evidence of Marasco's participation in the conspiracy was indeed insufficient to permit certain hearsay statements against him. It is further submitted that without the latter statements, there

was insufficient evidence of Marasco's participation in a conspiracy. From this it follows that there was insufficient evidence of Check's participation in a conspiracy, since without Marasco, there was no one with whom Check could conspire and, hence, no conspiracy.

A. There was insufficient non-hearsay evidence of co-defendant Marasco's participation in the conspiracy.

The independent non-hearsay evidence of co-defendant Marasco's membership in a conspiracy was insufficient to meet the requirement of United States v. Geaney, 417 F.2d 1116, 1120 (2d Cir. 1969), that before the trial court can permit the jury to consider hearsay evidence against a particular defendant it must determine that:

the prosecution has proved participation in the conspiracy, by the defendant against whom the hearsay is offered, by a fair preponderance of the evidence independent of the hearsay utterances.

The independent non-hearsay evidence of Marasco's participation in the conspiracy consisted of: (1) a slip of paper, seized from Marasco at the time of his arrest on November 30, 1976, which contained the address and phone number of Check; (2) the testimony of Marasco before a federal grand jury on October 5, 1976; and (3) the transcript of a recorded conversation which occurred on October 23, 1975, between Marasco and Cali, the Government informant (549-566; 773-780; 1000-1002).

The Government introduced at trial a slip of paper seized from Marasco as a result of a search pursuant to his arrest on November, 30, 1976 (27 months after the transactions with Spinelli) (543). Written on that slip of paper was the following: "28-20 Ocean Parkway, 372-1432" (543). Special Agent Purser of the Federal Bureau of Investigation testified that the address and phone number on the slip of paper were those of Sandy Check (544). Check testified that the address and phone number were, in fact, his. This piece of evidence was admissible as circumstantial evidence showing association between Marasco and Check, but nothing more. United States v. Ellis, 461 F.2d 962 (2d Cir. 1972); United States v. Cusumano, 429 F.2d 378, 381 (2d Cir. 1970). That Check and Marasco were acquaintances and perhaps friends was not disputed; they had known each other for fifteen years. But this is not enough to rise to the level of inculpatory evidence -- association with an alleged conspirator is insufficient to establish the necessary foundation of the existence of a conspiracy. United States v. Ragland, 375 F.2d 471, 477 (2d Cir. 1967). The slip of paper was proof of nothing more than the fact that Marasco knew Check.

In addition to this, the second piece of independent evidence, Marasco's grand jury testimony, confirms the fact that he knew Check and that the two had "discussions concerning

narcotics" (535). In his following answer, however, Marasco testified that he never talked about narcotics with Check. The grand jury testimony contains nothing more which would link Marasco to the conspiracy.

The third, and in the Government's view, the most damning piece of independent evidence introduced at trial in this regard was the transcript of an October 23, 1975 conversation between Marasco and Cali, a government agent.* The conversation, initiated by Cali (and recorded with the express purpose of obtaining evidence) is simply a discussion about drugs, the result of which is Marasco telling Cali that he will call him (he never did). This conversation, occurring some 14-months after the two heroin transactions, does nothing to connect Marasco with an ongoing conspiracy. No promises were made with respect to narcotics nor was there any agreement reached. Indeed, Cali regarded Marasco's response to his entreaties as "a run-around."

Thus, the independent non-hearsay evidence showed nothing more than an association between Marasco and Check, one that dated back some fifteen years to their youth. It should be noted that the Cali-Marasco conversation occurred fourteen months after the heroin transactions. The only connection that events subsequent

*The transcript appears in appellant's Appendix at .

to August, 1974 have to a purported conspiracy is the Government's efforts to build a case. There can be no possible connection between the Cali-Marasco conversation of October 23, 1975 and the alleged conspiracy which encompassed the transactions of August, 1974. Clearly, then, the Government's independent evidence did not satisfy the Geaney standard. Accordingly, statements made by Check ("Duky is my runner") which purportedly established Marasco's participation in the conspiracy, were inadmissible against Marasco.

B. There was insufficient evidence to warrant submitting the Conspiracy count to the jury.

It follows, from the foregoing analysis, that there was insufficient evidence of Marasco's participation in the conspiracy to warrant submitting the case to the jury. Even assuming that the lesser standard of Geaney were met, the only additional evidence of Marasco's participation were Check's statement that "Duky is my runner," and his direction to Cali to go outside the bar to get the half-ounce of heroin from Duky. Yet the evidence discloses that at the time Spinelli gave Check fifty dollars for a "taste" of heroin, Marasco was not presented. There is no indication from the record of how Cali obtained a "taste" some three days later. Nor was Marasco present when Spinelli gave \$1350 to Check for the purchase of the half-ounce of heroin. Marasco was not seen at the scene of this second transaction. The record

does not disclose from whom Cali actually received the narcotics. Moreover, at trial, Spinelli was unable to identify Marasco as the "unknown male" with whom he had seen Check previously (149). Based upon this evidence, it is submitted that a reasonable mind might not fairly conclude that Marasco was guilty of the conspiracy count beyond a reasonable doubt. United States v. Taylor, 464 F.2d 240 (2d Cir. 1972).*

The insufficiency of the evidence with respect to Marasco's participation in the conspiracy similarly vitiates Check's conviction on the conspiracy count, since without Marasco there was no conspiracy. A conspiracy is an agreement among the conspirators. United States v. Falcone, 311 U.S. 205, 210 (1940). Unless at least two people commit the act of agreeing, no one does. United States v. Rosenblatt, slip op. 3031, (2d Cir. April 9, 1977). Check could not be convicted of entering a conspiracy with Cali, since

*Indeed, it appears that in considering Marasco's Rule 29 Motion, the trial judge erroneously applied the lesser Geaney standard in lieu of the Taylor standard:

For those reasons, the motion for judgment of acquittal made by the defendant Marasco at the end of the Government's case would have to be denied, because there is sufficient independent evidence (566).

the Government admitted that in August, 1974, he was an agent of the Government. See Sears v. United States, 343 F.2d 139 (5th Cir. 1965). Therefore, the evidence adduced at trial was insufficient as a matter of law to sustain Check's conviction for conspiracy. Accordingly, the judgment of conviction with respect to the count in the indictment charging Check with conspiracy should be reversed.

POINT III

THE ADMISSION INTO EVIDENCE OF UNRELATED DEATH-THREAT TESTIMONY CONSTITUTED REVERSIBLE ERROR.

During his direct testimony, Spinelli gratuitously mentioned that Check had threatened to shoot anyone who caused "any problems" (135). Testifying about a conversation with Check, Spinelli stated:

...I had no identification, police identification, so for all practical purposes and knowing he was a police officer he could simply shoot me in the street...(132)

Counsel promptly objected, moved to strike the testimony, and also moved for a mistrial, arguing that the testimony was irrelevant and highly inflammatory. The trial judge denied the motions and allowed this further, highly prejudicial, testimony, following a leading question by the Government:

Q Detective Spinelli, during your conversations with Mr. Check, did Mr. Check ever make a

reference to somebody being killed?

* * *

A At the time following the discussion which I had with Sandy Check he did state to me that if he had any problems with anyone he wouldn't hesitate to shoot them...(135)

The Government justified its proffer of this evidence by arguing that Spinelli could testify that he did not have his gun with him and was not wired. Indeed, the trial judge based her ruling on the objection on these justifications. This argument was misleading, at best. In fact, Spinelli did have his firearm with him at the time of this conversation. Moreover, the "straw-man" argument that this testimony explained Spinelli's failure to wear recording equipment was premature. Even assuming the relevancy of this testimony, it could only be properly admissible to rebut inquiries made in this context on cross-examination.

Ordinarily, unrelated death-threat testimony is kept from the jury because its potential for causing unfair prejudice outweighs its probative value with respect to a defendant's guilt. United States v. Panebianco, 543 F.2d 447 (2d Cir. 1976). This Court has, under cautionary instructions, upheld the testimony of a witness explaining his own prior failure to testify for the

Government or his prior contradictory inconsistent statements because of fear or threatened retaliation. United States v. Malizia, 503 F.2d 578 (2d Cir. 1974); United States v. Cirillo, 468 F.2d 1233 (2d Cir. 1972). While these cases permit an impeached witness to explain the circumstances concerning his own state of mind, they do not extend to the buttressing of behavior which has not been called into question.

In the present case, the trial judge admitted, without cautionary instructions, the highly inflammatory testimony of an unimpeached witness. No question had been raised regarding either the Detective's safety or his failure to wear recording equipment. The Government raised these "straw men" in an effort to place before the jury evidence which had no place at this trial. The gratuitous references to death threats purportedly made by Check could serve no other purpose than inflaming the passions of the jury. The probative value of this evidence was substantially outweighed by the danger of unfair prejudice, confusion of the issues and misleading the jury; therefore, it should have been excluded. F.R. Evid 403.

The potential for misleading the jury can not be overestimated. The jury might reasonably have inferred that Check's threats had some relation to the failure of the Government's

informant, Cali, to testify. The cases upholding the limited admissability of death-threat testimony do not extend to the explanation for the failure of a presumably favorable witness to testify. A much more serious risk of a prejudice exists in such a case because the witness is not present to be cross-examined. United States v. Malizia, supra.

The obvious prejudice inherent in the death-threat testimony coupled with the inferences which the jury may have drawn, mandated the exclusion of this inflammatory and irrelevant testimony. Its admission, without any justification, and without any cautionary instructions, constituted reversible error.

POINT IV

THE COMBINATION OF ERRORS AT TRIAL REQUIRES REVERSAL.

The erroneous admission of hearsay evidence and inflammatory death-threat testimony combined with the erroneous submission of the conspiracy count to the jury mandates the reversal of Check's judgment of conviction. These errors, in themselves requiring reversal if considered alone, assume even greater significance when taken together.

The result of the errors discussed within was a contamination of the entire trial process from which the jury

could do little to insulate themselves. Thus, before hearing direct, competent evidence of Check's complicity, the jury was exposed to hearsay innuendo which portrayed Check as an experienced and willing drug dealer, already in possession of narcotics, and ready to proceed with a transaction. The error was clear and the prejudice apparent. The jury considered evidence from an inherently unreliable source whose disclosures were not subject to the rigors of cross-examination.

In addition, as a result of the erroneous submission of the conspiracy count to the jury, the jury was allowed to consider hearsay statements of Check's co-defendant which would otherwise be properly excluded absent the co-conspirator exception to the hearsay rule. Thus, the jury considered statements by Marasco in his grand jury testimony, regarding Check as well as statements made during his tape recorded conversation with the Government informant, Cali.

Moreover, the jury was exposed to death threats attributed to Check, prejudicial evidence of the highest order. In the face of these glaring errors, the jury could not fairly apprise the competent evidence without allowing the erroneously admitted prejudicial evidence to color their verdict. This raises the spectre that Check was convicted on the basis of

unsworn testimony of witnesses, inadmissable hearsay, and irrelevant and highly prejudicial testimony - a practice which runs counter to the notions of fairness on which our legal system is founded. The combination of these errors in the trial below warrants reversal of Check's convictions. United States v. Alfonso-Perez, 535 F.2d 1362 (2d Cir. 1976).

CONCLUSION

For the foregoing reasons, the judgment of conviction should be reversed and a new trial ordered.

Dated: New York, New York
June 6, 1977

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

DOCKET NO. 77-1208

UNITED STATES OF AMERICA,

Appellee,

against

SANDY CHECK,

Defendant-Appellant.

**AFFIDAVIT
OF SERVICE**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

STATE OF NEW YORK,
COUNTY OF NEW YORK, ss.:

Antonio D. Ramos, being duly sworn, deposes and says that he
is over the age of 18 years, is not a party to the action, and resides
at 10 Catherine St., New York, N.Y. 10038
That on June 8, 1977, he served 3 copies of Brief

on Peter Sudler
Assistant United States Attorney
1 St. Andrews Plaza
New York, New York 10007

by delivering to and leaving same with a proper person or persons in
charge of the office or offices at the above address or addresses during
the usual business hours of said day.

Antonio D. Ramos

Sworn to before me this
8th day of June, 1977.

John T. Deposito
JOHN T. DEPOSITO
Notary Public, State of New York
No. 80012350
Qualified in Nassau County
Commission Expires March 30, 1979